Dato' Hamzah bin Abdul Majid v Omega Securities Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–68–09 OF 2014

AHMAD MAAROP, JEFFREY TAN, ABU SAMAH AND ZAHARAH IBRAHIM FCJJ

4 NOVEMBER 2015

Civil Procedure — Pleadings — Issue not pleaded — Person sued by stockbroker for incurring margin trading losses sought to establish unpleaded defence that dispute concerned a loan and not margin trading losses — Trial judge admitted evidence of 'loan' but rejected same on ground it was not credible — Whether evidence of loan should not have been admitted as same radically departed from pleaded case was not a variation, modification or development of what was alleged in pleading

The respondent, a stockbroker, obtained judgment against the appellant in the High Court for contra losses incurred by the appellant on a margin trading account he had opened with the respondent. In his statement of defence, the appellant denied that he had executed a margin facility agreement with the respondent or that he was granted a margin trading facility or that he traded in shares under a margin account. Alternatively, he pleaded that he had instructed the respondent to sell 15.9m shares ('the pledged shares') he had pledged to the respondent which would have wiped out any alleged debt if those shares had been sold. During the trial, the appellant sought to establish an unpleaded defence, ie that the dispute between the parties concerned a loan and not margin trading losses. In his witness statement, the appellant had deposed that he had applied to the respondent for a loan of RM7m–RM8m and had deposited the pledged shares with the respondent; that RM8m was paid into an account of a company ('Cempaka') of which he was director and shareholder, and that the respondent was to have sold the pledged shares to settle the loan and refund any surplus to him. At the close of the trial, the respondent submitted that not only was a loan not pleaded there was no evidence of it. The respondent asserted that the pledged shares were collateral for the margin facility it had granted the appellant. Although the trial court had admitted and considered the evidence of the 'loan', it rejected the same on the ground it was not credible. The decision was upheld by the Court of Appeal resulting in the instant appeal.

Held, dismissing the appeal with cost:

(1) The respondent gave notice that it would object to the defence of 'loan' even before any evidence of 'loan' was adduced in court. In his witness

statement, the appellant asserted that it was a 'loan'. But that witness statement first had to be tendered and read at the hearing before it could become evidence-in-chief. The earliest opportunity for the respondent to object was at the stage of cross-examination of the appellant. But even before evidence of 'loan' could be adduced, it was agreed between the parties, with the concurrence of the trial judge, that whatever issue on the unpleaded defence would be raised at the stage of submissions at the close of the entire case. Given so, it was not right to fault the respondent for raising the objection at the stage of submissions at the close of the entire case (see para 13).

(2) There was an important exception to the rule that evidence though not pleaded was admissible if not objected to. The exception was when such evidence represented a radical departure from the pleadings and was not just a variation, modification or development of what had been alleged in the pleading in question (see holding of Supreme Court at pp 190–191 of *Superintendent of Lands and Surveys (4th Div) & Anor v Hamid bin Matusin & Ors* [1994] 3 MLJ 185). In the instant case, 'loan' was not a variation, modification or development but a radical departure from the pleaded case (see paras 14–15).

(3) A court might act on ex facie illegality in the absence of a plea. But other than ex facie illegality, any radical departure from the pleaded case must be pleaded to avoid surprise at the trial. Illegality on the face of it was not made out. Therefore, 'loan' which was not pleaded and which was a radical departure from the pleaded defence should not have been allowed to be proved at the trial (see para 15).

(4) There was no finding by the courts below that the respondent had deposited RM8m into Cempaka's account. Even the appellant admitted that there was no such evidence. The trial court found that it was margin trading and not 'loan' and those findings were based on solid evidence. The court agreed with that finding and wholly agreed with the courts below that 'loan' was clearly an afterthought (see para 17).

[Bahasa Malaysia summary

Responden, broker saham, memperolehi penghakiman terhadap perayu di Mahkamah Tinggi untuk kerugian kontra yang ditanggung oleh perayu atas akaun perdagangan margin yang dibukanya dengan responden. Dalam pernyataan pembelaannya, perayu menafikan bahawa dia melaksanakan perjanjian kemudahan margin dengan responden atau dia diberikan kemudahan perdagangan margin atau bahawa dia memperdagangkan saham-saham di bawah akaun margin. Secara alternatif, dia merayu bahawa dia telah mengarahkan responden untuk menjual 15.9 juta saham ('saham-saham yang dicagarkan') yang dia memberi jaminan kepada responden yang akan menghapuskan apa-apa hutang yang didakwa jika saham-saham tersebut telah

dijual. Semasa perbicaraan, perayu memohon untuk membuktikan pembelaan yang tidak dirayukan, iaitu bahawa pertikaian di antara pihak-pihak berkenaan pinjaman dan bukan kerugian perdagangan margin. Dalam pernyataan saksinya, perayu telah mendeposkan bahawa dia telah memohon kepada responden untuk pinjaman sebanyak RM7 juta – RM8 juta dan telah mendepositkan saham-saham yang dicagarkan tersebut dengan responden; bahawa RM8 juta dibayar ke dalam akaun syarikat ('Cempaka') yang mana dia adalah pengarah dan pemegang saham, dan bahawa responden telah menjual saham-saham yang dicagarkan untuk menyelesaikan pinjaman dan memulangkan semula apa-apa lebihan kepadanya. Pada akhir perbicaraan, responden berhujah bahawa bukan sahaja pinjaman tidak diplidkan tetapi tiada keterangan mengenainya. Responden mendesak bahawa saham-saham yang dicagarkan adalah kolateral untuk kemudahan margin yang diberikan kepada perayu. Walaupun mahkamah perbicaraan telah mengaku dan mempertimbangkan keterangan mengenai 'loan', ia menolaknya atas alasan ia tidak boleh dipercayai. Keputusan disahkan oleh Mahkamah Rayuan mengakibatkan rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Responden memberi notis bahawa ia akan membantah kepada pembelaan 'loan' sebelum apa-apa keterangan mengenai 'loan' dikemukakan di mahkamah. Dalam pernyataan saksinya, perayu mendesak bahawa ia adalah 'loan'. Tetapi pernyataan saksi tersebut terlebih dahulu mestilah dimasukkan dan dibaca pada pendengaran sebelum ia boleh menjadi keterangan utama. Peluang paling awal untuk responden membantah adalah diperingkat pemeriksaan balas perayu. Tetapi sebelum keterangan mengenai 'loan' boleh dikemukakan, ia dipersetujui antara pihak-pihak, dengan persetujuan hakim perbicaraan, bahawa apa-apa isu atas pembelaan yang tidak diplidkan akan dibangkitkan pada peringkat penghujahan pada akhir keseluruhan kes. Oleh itu, ia adalah tidak betul untuk mempersalahkan responden kerana membangkitkan bantahan diperingkat penghujahan pada akhir penutupan keseluruhan kes (lihat perenggan 13).

(2) Terdapat pengecualian yang penting kepada peraturan bahawa keterangan walaupun tidak diplidkan adalah boleh dikemukakan jika tidak dibantah. Pengecualian adalah apabila keterangan sedemikian merupakan penyimpangan radikal daripada pliding dan bukan sahaja variasi, modifikasi atau kemajuan apa yang telah didakwa di dalam pliding yang dipersoalkan (lihat keputusan Mahkamah Agung pada ms 190–191 of *Superintendent of Lands and Surveys (4th Div) & Anor v Hamid bin Matusin & Ors* [1994] 3 MLJ 185). Dalam kes ini, 'loan' bukan variasi, modifikasi atau kemajuan tetapi penyimpangan radikal daripada daripada kes yang diplidkan (lihat perenggan 14–15).

(3) Mahkamah boleh bertindak atas kepenyalahan undang-undang ex facie dalam ketiadaan pli. Tetapi selain daripada kepenyalahan undang-undang ex facie, apa-apa penyimpangan radikal daripada kes yang diplidkan mesti diplidkan untuk mengelak kejutan pada masa perbicaraan. Kepenyalahan undang-undang tidak dibuat. Oleh itu, 'loan' yang tidak diplidkan dan yang mana adalah penyimpangan radikal daripada pembelaan yang diplidkan tidak patut dibenarkan pada masa perbicaraan (lihat perenggan 15).

(4) Tiada dapatan oleh mahkamah bawahan bahawa responden telah mendepositkan sebanyak RM8 juta ke dalam akaun Cempaka. Perayu juga mengakui bahawa tidak terdapat keterangan sedemikian. Hakim perbicaraan mendapati bahawa ia adalah perdagangan margin dan bukan 'loan' dan keputusan tersebut adalah berdasarkan keterangan yang kukuh. Mahkamah bersetuju dengan dapatan tersebut dan bersetuju secara keseluruhannya dengan mahkamah bawahan bahawa 'loan' tersebut jelas sesuatu yang difikirkan kemudian (lihat perenggan 17).]]]]]]

Notes

For cases on issue not pleaded, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7105–7124.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Hirachand Punamchand v Temple [1911] 2 KB 330, CA (refd)
KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10, FC (refd)
Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281, SC (refd)
Malayan Banking v PK Rajamani [1994] 1 MLJ 405, SC (refd)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (refd)
Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan [1984] 2 MLJ 1, PC (refd)
State Government of Perak v Muniandy [1986] 1 MLJ 490, SC (refd)
Superintendent of Lands and Surveys (4th Div) & anor v Hamit bin Matusin & ors [1994] 3 MLJ 185, SC (distd)
Woo Yew Chee v Yong Yong Hoo [1979] 1 MLJ 131, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78
Evidence Act 1950 s 91
Rules of Court 2012 O 35A
Rules of High Court 1980 O 18 r 7(1)

Gopal Sri Ram (Shahrizat Rashid & Lee) for the appellant.
R Vinayaga (Skrine) for the respondent.

Jeffrey Tan FCJ (delivering judgment of the court):

[1] Leave was granted to the appellant/defendant to appeal against the concurrent findings of the courts below on the following questions of law:

(a) whether as a matter of law, the elements of a loan exist where at the request of a person, payment of money is made by the payer to a third party, having regard to the decision of the English Court of Appeal in *Hirachand Punamchand v Temple* [1911] 2 KB 330; and

(b) whether a court, having regard to the principle established by the decision in *Superintendent of Lands and Surveys (4th Div) & anor v Hamit bin Matusin & ors* [1994] 3 MLJ 185, having admitted evidence on an unpleaded point is entitled to reject that evidence by reference to the fact that it was not pleaded.

[2] The background facts could be summarised as follows. On 4 September 1997, the respondent/plaintiff, a stock broking firm, issued an offer to the appellant to open a share trading account. The appellant accepted that offer and executed an undated individual account application form and an undated margin facility agreement ('MFA'). Thereafter, the respondent granted a margin trading facility ('MTF') of up to a limit of RM10m to the appellant to enable the appellant to trade on securities listed on the Kuala Lumpur Stock Exchange. For the purpose of his share trading transactions, the appellant maintained a Margin Account No HA600/DLH.

[3] By its statement of claim dated 28 November 2007, the respondent claimed from the appellant the sum of RM12,658,779, it being alleged contra losses on share transactions as at 18 April 2005, and interest on the sum of RM5,997,788.53 at the rate of 13.5%pa calculated on a daily basis from 19 April 2005. In his statement of defence, the appellant denied that he executed the said MFA, that he was granted the said MTF, or that he traded in share transactions under the said margin account. Alternatively, the appellant pleaded that he instructed the respondent to dispose of 15,939,000 shares in Wembley Industries Holding Bhd that he had pledged to the respondent in 1998, which, if disposed, it was averred, would have been sufficient to cover any alleged debt. Limitation was also raised as a defence, but both the High Court and Court of Appeal held, in the application of the appellant to strike out the claim and in the appeal therefrom, that the action was not time-barred.

[4] Hence, when trial commenced, the pleaded defence consisted of a denial of the margin account and share transactions, and an assertion that the pledged

shares, if disposed, would have been sufficient to settle the margin losses. But an unpleaded defence, one which changed the character of the pleaded defence, was raised by the appellant during the trial. The unpleaded defence was first raised by learned counsel for the appellant during his cross-examination of PW1. After an exhaustive examination on all conceivable matters that could have had to do with the margin account (see pp 167–211 AR), learned counsel for the appellant suggested to PW1, who disagreed, 'that Dato' Hamzah had deposited 15m Wembley shares with instructions to Omega to sell the shares at the very onset to repay the loan (of RM8m) and return the surplus to him'.

[5] The transcript is not clear as to when learned counsel for the respondent first challenged the suggestion that it was a loan and not margin trading. But at p 219 AR, that is, during the re-examination of PW1, there ensued the following exchange between learned trial judge and counsel:

> Judge: Why you didn't stand up and stop him at that time? You didn't object.
>
> PC: Yes. I didn't want to really object at the onset. By looking at it, it really got not so much of damage and even if My Lord feels that I should have object(ed) to it, I couldn't be jumping up and down. For instance, money lending was not pleaded, loan was not pleaded, whether the transaction was a sham was not pleaded. They never challenged the account, so they were just asking questions. I didn't want to interrupt them.
>
> DC: I think I can deal with that in the submission.
>
> PC: Yes, we didn't want to interrupt too much on the procedures.
>
> Judge: Yes.

[6] Therefore, between the parties, it was agreed, with the concurrence of the learned trial judge, to put whatever objection to any unpleaded defence on the back burner, to be taken up only at the stage of submissions at the close of the entire case. But even so, learned counsel for the respondent perspicaciously elicited an answer from PW1 that it was not a moneylending transaction (see p 223 of the appeal record). PW2 was not cross-examined on the alleged loan. Meantime, in his witness statement (pp 335–343 AR), the appellant had affirmed that he applied to the respondent for a loan of RM7–8m, that he deposited 15.9m Wembley shares with the respondent, that a sum of RM8m was deposited into his account (the appellant would later testify that it was actually deposited into the account of Cempaka Holdings Sdn Bhd ('Cempaka'), where he was a director and shareholder), and that the respondent would sell those shares to settle the loan and refund any surplus to him. The appellant denied all knowledge of his execution of the MFA, MTF or other documents produced by the respondent. The appellant also denied receipt of the monthly statements of accounts from the respondent. Under examination-in-chief, the appellant reaffirmed that it was a loan and not margin trading. Under cross-examination, the appellant agreed that 'loan' was

not pleaded in his defence (see p 273 AR). At the close of the entire case, the learned trial judge directed parties to file written submissions.

[7] In his written submission to the learned trial judge, learned counsel for the respondent submitted, with respect to the alleged loan, as follows. 'Loan' was not pleaded in the defence. No application was made to amend the defence. 'Loan' was not averred to in the application to strike out the claim. The appellant contended that the loan sum of RM8m was disbursed to the account of Cempaka. 'No evidence was produced to prove that RM8m was indeed transferred into the account. When he was questioned about whether or not the auditors of Cempaka queried him as to how the RM8m allegedly came into the account, DW1 merely said that he cannot recall as it was such a long time ago ... Even if RM8m was indeed deposited after the defendant had pledged shares to the plaintiff, it does not prove that ... there was a loan. The shares were pledged for the margin facility that the plaintiff granted to the defendant'. The appellant did not mention 'loan' when he met the respondent's liquidators. 'Loan' was not raised in the appellant's solicitors' first letter to the respondent. 'Loan' was an afterthought. 'Loan' was not raised in the defence or in the issues to be tried. Parties are bound by their pleadings (*State Government of Perak v Muniandy* [1986] 1 MLJ 490 was cited). If the appellant wanted a loan, he could have approached a bank. Section 91 of the Evidence Act 1950 excludes oral evidence which varies or adds to the terms of a written contract. No document was produced to prove that it was the respondent who deposited RM8m into the account of Cempaka.

[8] In response, learned counsel for the appellant submitted to the learned trial judge as follows. Based on *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283, where it was held by the Federal Court that it is the duty of the court to consider the evidence let in without objection on the unpleaded case of estoppel, it was too late for the respondent to object to the issue of 'loan'. Objection to 'loan' should be made at the first opportunity. In *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281, it was held by the former Supreme Court that the court can take judicial notice of illegality where facts which have not been pleaded emerge in evidence.

[9] Before us, it was orally submitted by learned counsel for the appellant that evidence of 'loan' was admitted but then was rejected by the learned trial judge, and that the only rationale for the payment of RM8m into the account of Cempaka was loan against shares, and that the substance of the transaction was overlooked by the learned trial judge. Learned counsel for the appellant cited *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10, *Oversea-Chinese Banking Corporation Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1 and *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd*

[1995] 3 MLJ 331; [1995] 4 CLJ 283 to support the argument that evidence of 'loan', since recorded, should have been considered, and *Woo Yew Chee v Yong Yong Hoo* [1979] 1 MLJ 131 and *Malayan Banking v PK Rajamani* [1994] 1 MLJ 405 to amplify that courts should look at the substance and not the label attached to the transaction. In his written submission, learned counsel for the appellant, submitted 'it is submitted here that as payment by a third party to a lender is considered good payment, payment by a lender to a third party at the request of the borrower must also be considered good payment. The appellant relies on *Hirachand Punamchand and ors v Temple*'.

[10] Learned counsel for the respondent orally submitted that in order to succeed the appellant must persuade this court to overturn the findings of the courts below, that there was no evidence that the respondent credited RM8m into the account of Cempaka or that Cempaka paid that sum to the appellant in order to substantiate the fact of 'loan', and that the share transactions were documented in pp 429–444 AR.

[11] Leave question 2 suggested, as if it were fact, that the learned trial judge (i) did not follow *Superintendent of Lands and Surveys (4th Div) & anor v Hamit bin Matusin & ors*, and (ii) admitted evidence on an unpleaded point but then rejected that evidence 'by reference to the fact that it was not pleaded'. But with respect, the learned trial judge had done nothing of that sort. In fact, the learned trial judge plainly applied *Superintendent of Lands and Surveys (4th Div) & anor v Hamit bin Matusin & ors* (see para 6.2.1(iv) of the grounds of the learned trial judge) and admitted the evidence of the 'loan' (see para 6.2.1(v) of the grounds of the learned trial judge). But the learned trial judge held that 'loan' was an afterthought (see para 6.2.1(v) of the grounds of the learned trial judge) which was not proved on a balance of probabilities (see para 6.2.1(vii) of the grounds of the learned trial judge), and, that it was no 'loan' (see para 6.2.1(viii) of the grounds of the learned trial judge). 22 reasons and five sub-reasons were given by the learned trial judge for his finding that it was not 'loan' (see pp 78–92 AR). And being 'not pleaded' was not one of those reasons. It was absolutely untrue that evidence of 'loan' was rejected by the learned trial judge on the ground that it was not pleaded. The facts asserted in leave question 2 could not be further from the truth.

[12] The irony of it all is that the learned trial judge should not have applied *Superintendent of Lands and Surveys (4th Div) & anor v Hamit bin Matusin & ors*. In the latter case, in the final submission after the conclusion of all the evidence, an objection was raised for the first time by the plaintiffs that certain defences were not pleaded and ought to be disregarded under O 18 r 7(1) of the Rules of the High Court 1980. The former Supreme Court per Peh Swee Chin SCJ, later FCJ, delivering the judgment of the court, said:

Generally, in civil cases only, both parties can validate any mode of adducing

A evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent. Technical rules of evidence can be to a limited extent, even dispensed with by a court without such consent, please see *Baerlein v Chartered Mercantile Bank* [1895] 2 Ch 488; similarly with technical rules of procedure. Therefore, when such evidence represents a departure from
B pleadings, it should be objected to as when and where it is adduced, and it will be too late when it only objected to later on, as in the final submission at the close of evidence in the instant appeal. In these circumstances, the party facing such evidence at variance from the pleadings, by failing to object, cannot be said to be taken by surprise, prejudiced, misled or embarrassed. Otherwise, the other side of
C the coin would be, in the event of such an objection raised at the stage of final submission being accepted by the court, that the party adducing such evidence may face the great risk of being denied leave to amend his pleadings in question at that stage.

D **[13]** The former Supreme Court decreed that 'it should be objected to as when and where it is adduced'. But in the instant case, the respondent gave notice that it would object to the defence of 'loan' even before any evidence of 'loan' was adduced in court. In his witness statement, the appellant asserted that it was a 'loan'. But that witness statement must be first tendered and read
E at the hearing before it would become evidence-in-chief (O 35A of the Rules of Court 2012). Evidence of 'loan' was only adduced when the appellant tendered and read his witness statement at the hearing. The earliest opportunity for the respondent to object was at the stage of cross-examination of the appellant. But even before evidence of 'loan' could be adduced, it was agreed between the
F parties, with the concurrence of the learned trial judge, to only raise whatever issue on the unpleaded defence at the stage of submissions at the close of the entire case. Given so, it was not right to fault the respondent for raising the objection at the stage of submissions at the close of the entire case. And given further that the instant facts were so different, it was just not apposite to apply
G *Superintendent of Lands and Surveys (4th Div) & anor v Hamit bin Matusin & ors*, where 'the alleged defences were not a radical departure from what had been pleaded and was a mere development of it' (see *Singapore Civil Procedure 2015* Vol 1 at p 18/7/12).

H **[14]** It was also not proper to apply *Superintendent of Lands and Surveys (4th Div) & anor v Hamit bin Matusin & ors* just because of the fact that the evidence was adduced without objection. For there is an important exception to the rule that evidence though not pleaded but if not objected to is admissible. At pp 190–191 of the report, that is immediately after the above quoted passage,
I the former Supreme Court in *Superintendent of Lands and Surveys (4th Div) & anor v Hamit bin Matusin & ors* instructed:

> Such evidence, when given without any objection by the opposing party, will further have the effect of curing the absence of such plea in the relevant pleading, in other words, the effect of overcoming such defect in such pleading. As was stated by

the Federal Court in *Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 at p 278: 'Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise'. There is, however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence.

The exception is when such evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v George Wimpey & Co Ltd* [1970] 1 All ER 474; [1969] 1 WLR 1764, which gave rise to the proposition, which was approved by *Ang Koon Kau Anor v Lau Piang Ngong* 1994 3 MLJ 185 at p 191 and *John G Stein & Co Ltd v O'Hanlon* [1965] AC 890; [1965] 1 All ER 547; [1965] 2 WLR 496.

Therefore, a court inevitably ought to enquire, when there is failure to object to such evidence when it is adduced, whether it is such a radical departure, if not, it is a mere variation, modification or a development, then the impropriety of admission of such evidence at variance with the pleadings is deemed to be waived and the defect in such pleadings cured.

[15] 'Loan' was not a variation, modification or development but a radical departure from the pleaded case. Hence, *Superintendent of Lands and Surveys (4th Div) & anor v Hamit bin Matusin & ors* could not apply. 'If the contract does not appear to be illegal on its face evidence of circumstances showing that it an illegal object will not be admitted unless those circumstances are pleaded' (*Civil Practice in Singapore and Malaysia* Vol 1 by Jeffrey Pinsler at p 627). A court may act on ex facie illegality in the absence of a plea (see *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212). But other than ex facie illegality, any radical departure from the pleaded case must be pleaded, to avoid surprise at the trial. Illegality on the face of it was not made out. Therefore, 'loan', which was not pleaded and which was a radical departure from the pleaded defence, should not have been allowed to be proved at the trial (see *Singapore Civil Procedure 2015* Vol 1 at p 18/8/2).

[16] Be that as it may and in any event, evidence of 'loan' was not rejected by the learned trial judge 'by reference to the fact that it was not pleaded'. 'Loan' was rejected by reference to the fact that it was not credible. Leave question 2 was premised on a misconception of the findings of the learned trial judge. Since the factual gravamen was absent, it would be wholly idle to answer leave question 2, for whatever answer could not produce a result that could decide it for the appellant.

[17] The facts were also not there for leave question 1 to be posed. The facts asserted in leave question 1 read 'where at the request of a person, payment is made by the payor to a third party ...'. Quite plainly, those asserted facts

assumed as a given that it was the respondent who deposited the said RM8m into the account of Cempaka. But there was no finding by the courts below that it was the respondent who deposited RM8m into the account of Cempaka. Rather, the finding of the learned trial judge was that 'there is no evidence to show that the sum of RM7,953,750 was in fact credited into the account of (Cempaka) by the (appellant) by way of a loan' (see para 6.2.1(vii)(e) of the grounds of the learned trial judge). Even the appellant admitted at pp 301–302 AR that he had no evidence that it was the respondent who deposited that sum into the account of Cempaka. The finding of the learned trial judge was that it was margin trading and not loan. As said, the learned trial judge gave umpteen reasons for those findings. And those findings, which were based on solid evidence, namely individual account application, margin facility agreement, contra notes, contra statements, monthly statements, margin financing reports, client's history transactions, and, summary of share transactions (see pp 422–453 AR), should not be lightly disturbed by an appellate court. The appellant contended that margin trading was a sham. But 'loan' was not raised by the appellant in his correspondence, in his defence, in his application to strike out the claim, or by him at any one occasion before trial. We wholly agree with the courts below that 'loan' was clearly an afterthought. The pay-in slip mustered by the appellant was evidence of some deposit into the account of Cempaka. But that pay-in slip was not evidence that it was the respondent who paid that sum into the account of Cempaka. The only evidence that was certain was that it was margin trading. Given that we agree with the finding of margin trading and that it was not a loan, we could not answer leave question 1.

[18] In the premises of the aforesaid, we, the remaining judges (see s 78 of the Courts of Judicature Act 1964), following the resignation of Mohamed Apandi Ali FCJ, as he then was, now AG, unanimously dismiss this appeal with costs.

Appeal dismissed with costs.

Reported by Ashok Kumar